

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 August 2024

DOCKET NUMBER: AR20230012880

APPLICANT REQUESTS: through her Member of Congress, in effect:

- correction of her deceased husband's record to show he changed his Reserve Component (RC) Survivor Benefit Plan (RCSBP) to add his spouse within 1 year of marriage
- receipt of the Survivor Benefit Plan (SBP) annuity as the widow of a deceased RC service member (SM)

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Self-authored Letter, undated
- Marriage Certificate, 14 October 2003
- SM's Certificate of Death, 31 January 2023
- Defense Finance and Accounting Service (DFAS) Military Annuitant Pay Letter, 5 September 2023
- three Letters of Support

FACTS:

1. The applicant, the surviving spouse of the deceased RC SM, states she thought her husband had updated his RCSBP paperwork prior to the 1-year deadline after they married in 2003. He deployed to Fort Gillem, GA, in 2003 and returned to Camp Atterbury, IN, in 2005 to work until his deployment to Afghanistan in 2006. She did not find out that he did not update his RCSBP paperwork until after she applied for survivor benefits. They were married for almost 20 years and it was his intent to take care of her for life and in death.

2. After prior enlisted service in the Army National Guard, the SM was appointed as a Reserve commissioned officer in the Indiana Army National Guard in the rank/grade of second lieutenant/O-1 and executed his oath of office effective 1 August 1985. He was promoted to the rank/grade of major/O-4 effective 30 January 2001.

3. The State of Indiana Military Department Office of the Adjutant General memorandum (Notification of Eligibility for Retired Pay at Age 60), 28 February 2002, notified the SM that he completed the required qualifying years of Reserve service for retired pay upon application at age 60 in accordance with applicable laws.
4. The SM's DD Form 1833 (SBP Election Certificate), 18 March 2002, shows he was not married and had two dependent children: R____ A. W____, a daughter born in 1988, and Z____ E. W____, a son born in 1992.
 - He placed an "X" in the "Children Only" block for the type of coverage he desired and an "X" in the "Option C (Immediate Coverage)" block as his election status.
 - Option C states: "I elect to provide an immediate annuity beginning on the day after date of my death, whether before or after age 60."
 - He and a witness signed the form on 18 March 2002.
5. The SM and the applicant married on 14 October 2003.
6. Joint Forces Headquarters Indiana Orders 332-1023, 28 November 2007, separated the SM from the Army National Guard and assigned him to the Retired Reserve effective 31 December 2007.
7. The SM's National Guard Bureau Form 22 (Report of Separation and Record of Service) shows he was separated from the Indiana Army National Guard and transferred to the U.S. Army Reserve Control Group (Retired Reserve) in the rank of major effective 31 December 2007. He completed 25 years, 10 months, and 6 days of total service for retired pay.
8. The SM's death certificate shows he passed away on 31 January 2023. He was 58 years of age when he passed. The applicant is named as his spouse at the time of his death.
9. The SM would have reached age 60 in September 2024.
10. The SM's records show the applicant submitted a DD Form 2656-7 (Verification for Survivor Annuity), 14 March 2023, with auxiliary documents, verifying her eligibility for an annuity under the RCSBP and listing one dependent son, M____ T. W____, with a birthdate in 2004.
11. The DFAS Military Annuitant Pay Letter, 5 September 2023, informed the applicant that her application for SBP and/or Retired Serviceman's Family Protection Plan benefits from the deceased SM's retired pay account was denied. DFAS records reflect the SM elected "Child(ren) Only" coverage. She had the right to appeal to the Defense

Office of Hearings and Appeals or submit an appeal to DFAS Retired and Annuitant Pay.

12. There is no evidence indicating the applicant appealed to the Defense Office of Hearings and Appeals or DFAS Retired and Annuitant Pay.

13. The applicant provided three letters of support from friends noting the SM's intent to take care of his wife in the event of his passing.

14. The email correspondence from the DFAS Board for Correction of Military Records/ Congressional Lead (Reply: Army Review Boards Agency Assistance), 25 July 2024, notes the SM died in 2023. The DFAS database contains:

a. the same DD Form 149, 3 October 2023, with the same supporting documents, described above;

b. the applicant's DD Form 2656-7, 8 September 2023, described above, with son's birth certificate;

c. the applicant's driver's license and social security card, and the SM's social security card;

d. the DFAS letter to the SM's son, M____ T. W____, 1 April 2024, noting he is currently receiving an SBP child annuity and is between the ages of 18 and 22 and is attending school full time as an unmarried person. He needed to complete sections I and III of the enclosed DD Form 2788 (Child Annuitant's School Certificate) to declare his intent to attend school full time for the next school year to continue receiving the SBP annuity. He acknowledged the letter with his signature on 10 April 2024; and

e. the son's DD Form 2788, Section III (Future Intent to Attend or Continue to Attend School on a Full-Time Basis), block 1 (After the end of the current school year do you intend to enroll or continue as a full time student with less than a 150-day (5 months) break between school years?), showing he placed an "X" in the "No" box and signed and dated the form on 10 April 2024.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence shows the SM elected RC SBP coverage for children in his March 2002 election. He married the applicant in 2003. The Board found no evidence he changed his election within 1 year of his marriage. Moreover, the Board noted that granting relief

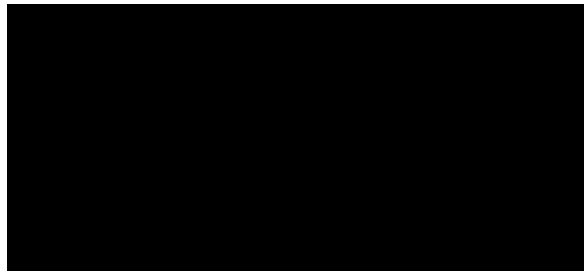
to the applicant would adversely affect the rights of another individual. SBP elections are by category; not individual. Only one category of SBP beneficiary may receive the annuity at any one time. In this case, the SBP annuity is already being paid, or has already been paid, to at least one of the former service member's (SM's) children. This annuity payment is in accordance with the SM's stated SBP preferences, which are detailed in the SM's 18 March 2002 DD Form 1883. On that form, the SM selected "Children Only" as his beneficiary category. Additional documentation in the case file indicates that Ma__ Wh__, the SM's child (and possibly a child of the applicant) has received SBP annuity payments. As such, any favorable ABCMR action on behalf the applicant would interfere with, and adversely affect, Ma__ Wh__'s SBP interests. Therefore, the Board determined relief is not warranted.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.



I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Public Law 92-425, enacted 21 September 1972, established the SBP. The SBP provides that military members on active duty could elect to have their retired pay reduced to provide for an annuity after death to surviving dependents. An election, once made, was irrevocable except in certain circumstances. Elections are made by category, not by name. The election must be made before the effective date of retirement or coverage defaults to automatic spouse coverage. Since its creation, the SBP has been subjected to a number of substantial legislative changes.
2. Public Law 95-397, the RCSBP, enacted 30 September 1978, provided a way for those who qualified for Non-Regular (Reserve) retirement but were not yet age 60 (and eligible to participate in the SBP) to provide an annuity for their survivors should they die before reaching age 60. Three options are available: (A) elect to decline enrollment and choose at age 60 whether to start SBP participation; (B) elect that a beneficiary receive an annuity if they die before age 60 but delay payment until the date of the member's 60th birthday; or (C) elect that a beneficiary receive an annuity immediately upon their death if before age 60. If death does not occur before age 60, the RCSBP costs for Options B and C are deducted from the member's retired pay (costs for Option C being the more expensive). Once a member elects either Option B or C in any category of coverage, that election is irrevocable. Option B and C participants do not make a new SBP election at age 60. They cannot cancel SBP participation or change options they had in the RCSBP; the RCSBP automatically converts to SBP coverage. If RCSBP Option B or C is elected, there is an RC cost added to the basic cost of the SBP to cover the additional benefit and assured protection should the member die prior to age 60.
3. Title 10, U.S. Code, section 1448(a), provides that a person who is not married and has no dependent child upon becoming eligible to participate in the SBP but who later marries or acquires a dependent child may elect to participate in the SBP. Such an election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date on which that person marries or acquires that dependent child. The Defense Finance and Accounting Service interprets the first part of Title 10, U.S. Code, section 1448(a)(5), to mean "who is not married OR has no dependent child."
4. The Retired Reserve consists of all Reserve officers and enlisted personnel who are otherwise eligible for retired pay but have not reached age 60, who have not elected discharge and are not voluntary members of the Ready or Standby Reserve, and other retired Reservists under certain conditions.
5. The DFAS website defines "gray area" retirees as RC members who served in the National Guard or Reserve, are qualified for retired pay, and have "retired" from their

service (stopped drilling), but are not yet at the age where they can begin receiving retired pay. The time between their "retirement" from the service and the date when they are eligible to begin receiving retired pay is the "gray area." The "gray area" applies even if the member is assigned to the Retired Reserve.

//NOTHING FOLLOWS//